

APPEAL NO. 021609
FILED ON JULY 31, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was scheduled for March 21, 2002, but continued to and held on April 24, 2002, with the record closing on May 10, 2002. The hearing officer determined (1) that the respondent/cross-appellant (claimant) did not sustain an occupational disease injury that arose out of and within the course and scope of his employment; (2) that the date of injury, the date that the claimant knew or should have known that the injury may be related to his employment, pursuant to Section 408.007, is _____; (3) that the appellant/cross respondent (carrier) is not relieved from liability for this claim under Section 409.002, because it waived the defense of failure to timely notify the employer of the injury by failing to timely contest compensability of the injury, as required by Section 409.021; (4) that the carrier is not relieved of liability under Section 409.004 because of the claimant's failure to timely file a claim for compensation within one year of the injury, as required by Section 409.003, because the carrier did not validly contest the claim on any basis; (5) that the carrier did waive the right to dispute compensability of the claimed injury by not contesting the injury as required by Section 409.021, thereby making the claimant's injury a compensable injury; and (6) that the claimant had disability from April 12, 2000, and continuing through the date of the CCH.

The carrier appeals the determinations that it waived the right to dispute compensability of the claimed injury under Section 409.021, and that, as a result, the claimant's injury is compensable; that the claimant had disability from April 12, 2000, through the date of the CCH; and that the carrier is not relieved of liability under Section 409.004 due to the claimant's failure, without good cause, to timely file a claim for compensation. The claimant submitted a response to the carrier's appeal, urging affirmance of the date-of-injury determination, the determinations that the carrier is not relieved of liability under Sections 409.002 or 409.004, and the disability determination. The claimant appeals the determinations that he did not sustain an injury in the form of an occupational disease that arose out of and within the course and scope of his employment, and that the claimant did not timely report an injury to the employer.

DECISION

Affirmed.

FACTUAL BACKGROUND

The claimant had worked as a farm laborer for the employer for several years at the time that he developed skin ulcers. His work included mixing chemicals, such as fertilizers and pesticides, with water for application to the crops. On or about November 15, 1999, the claimant was unable to work because of the ulcers and sought medical treatment in Mexico. He did not obtain lasting relief from treatment prescribed there.

On _____, the claimant sought treatment from (Dr. O); he was hospitalized and treated as an in-patient for about 10 days. Dr. O attributed the claimant's skin condition to his work and handling of chemicals to a "reasonable medical probability." The claimant has little formal education, speaks Spanish only, and does not read or write any language. It was only when Dr. O began to treat him that he "knew for certain" that his condition was caused by work. The hearing officer found the date of injury, pursuant to Section 408.007, to be _____, and neither party has expressed disagreement with that finding.

It was stipulated that the carrier received first written notice of the claimant's injury on February 24, 2000, more than 30 days after the date of injury. The hearing officer found no good cause for the claimant's failure to report the injury to the employer in a timely manner. Laboratory test results received on February 17, 2000, were positive for staph and strep infections. The carrier verbally notified the claimant on March 8, 2000, that it had accepted liability of the claim. The carrier filed its first Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on March 23, 2000, initiating payment of temporary income benefits. There is evidence from the carrier indicating that a second TWCC-21 was completed on April 11, 2000, disputing compensability of the claim, but that form was not filed with the Texas Workers' Compensation Commission (Commission) until July 18, 2000. The second TWCC-21 disputed compensability of the injury, asserting that the disease is an ordinary disease of life, that it was not caused by the employment, and that the defense of timely failure to report the injury to the employer applied, and disputed disability. The hearing officer found that this TWCC-21 did not timely dispute the compensability of the injury. The claimant did not submit an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) to the Commission field office until August 24, 2001. The TWCC-41 needed to be filed by _____, in order to be timely, pursuant to Section 409.003(2). The claimant argued at the CCH and on appeal that there was good cause for the late filing of the TWCC-41, based upon the claimant's lack of education and lack of knowledge of procedures, but the hearing officer did not find that there was good cause for the late filing. Rather, she found that the claimant was not required to file a claim because the carrier did not contest the claim. No additional TWCC-21 was submitted by the carrier contesting the claim as being untimely filed.

Dr. O diagnosed the claimant with chronic vasculitis, opining that it was a "poison toxic effect" of exposure to pesticides in connection with the claimant's employment, but the hearing officer was not persuaded that the claimant met his burden of proving the identity or the toxicity of the chemicals to which the claimant was allegedly exposed, nor did he prove that his skin condition, staph infection, and strep infection were caused by his exposure to chemicals in connection with his employment. The hearing officer concluded that the claimant did not sustain an occupational disease that arose out of and within the course and scope of his employment, but that because of the carrier's failure to timely contest compensability in accordance with Section 409.021, the injury became compensable.

CLAIMANT'S APPEAL OF DETERMINATION OF NO INJURY IN COURSE AND SCOPE AND FAILURE TO TIMELY NOTIFY EMPLOYER

The hearing officer did not err in determining that the claimant did not sustain an injury in the form of an occupational disease that arose out of and within the course and scope of his employment, and that the claimant did not provide timely notice to the employer. These were questions of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, we cannot conclude that the challenged determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Thus, no sound basis exists for us to disturb the injury and failure to timely report determinations on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

CARRIER'S APPEAL REGARDING WAIVER OF RIGHT TO DISPUTE COMPENSABILITY, DISABILITY AND DATES OF DISABILITY, AND CLAIMANT'S FILING OF CLAIM

A carrier is required to dispute the compensability of an injury not later than 60 days after receipt of written notice of injury, or it will waive its right to do so. Section 409.021(c). The evidence establishes that the carrier received written notice of the claimant's injury on February 24, 2000. The carrier contends that it filed its second TWCC-21, disputing compensability of the claim, with the Commission, via facsimile, on April 11, 2000. In support of this contention, carrier attaches the affidavit of the claims adjuster. Commission records, however, do not reflect receipt of a TWCC-21 on that date (Claimant's Exhibit No. 33). The TWCC-21 disputing compensability of the injury was not filed with the Commission until July 18, 2000. We are satisfied that this evidence sufficiently supports the hearing officer's determination that the carrier waived its right to dispute compensability of the injury by not doing so within 60 days after receiving written notice of the injury.

Whether the claimant had disability is a factual determination for the hearing officer to resolve. The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra; In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We have reviewed the matters complained of on appeal and conclude that the hearing officer's decision is supported by sufficient evidence.

The carrier appeals the hearing officer's determination of the timely filing issue under Section 409.004, asserting that the hearing officer erred by determining that the claimant was not required to timely (within one year of the date of injury) file a claim for compensation because the carrier did not contest the claim as required by Section 409.021. The carrier makes a lengthy argument, based primarily on the assertion that

our decision in Texas Workers' Compensation Commission Appeal No. 94224, decided April 1, 1994, was wrongly decided. We have applied the rationale set forth in Appeal No. 94224 numerous times, including as recently as March of this year. See Texas Workers' Compensation Commission Appeal No. 020375, decided March 28, 2002. We adhere to our previous decisions on this issue, and reject the argument that we should not apply Appeal No. 94224 in this case. In Texas Workers' Compensation Commission Appeal No. 950100, decided March 2, 1995, we discussed nearly identical arguments to those set forth in this case and repeat a portion of our analysis from that decision:

That decision [Appeal No. 94224] reconciled various provisions of the 1989 Act by pointing out that the procedure for contesting compensability within 60 days, as set out in Section 409.021(c), also applied to disputes over liability for benefits based on failure to file a claim within one year of the injury as required by Sections 409.003 and 409.004. Thus, should a claimant fail to file a claim for benefits within one year of an injury, a carrier who wishes to dispute its liability on this basis must do so within 60 days of written notice of the untimely claim.

We have long held that the Section 409.021(c) procedure for contesting compensability within 60 days applies to disputes over liability for benefits based on a failure to file a claim within one year of the injury.

There is an additional compelling reason to hold that the carrier is not relieved of liability for the claimant's failure to file a claim within one year. The carrier did not contest compensability for that reason at any time prior to the benefit review conference.

Accordingly, we affirm the hearing officer's determination that the carrier had waived the defense of failure to file a timely claim. Although our rationale may not be exactly the same as that stated by the hearing officer, we cite Daylin, Inc. v. Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989, writ denied) for the long-established principle that the judgment of the lower court should be affirmed, if it can be sustained on any reasonable basis supported by the evidence.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**C T CORPORATION SYSTEM
350 NORTH ST. PAUL
DALLAS, TEXAS 75201.**

Michael B. McShane
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Roy L. Warren
Appeals Judge